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NOS. 82-185, 82-246, 82-259

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, et al.,
Petitioners,

v.

BOSTON CHAPTER, NAACP, et al.,
and
PEDRO CASTRO, et al.,
Respondents.

REPLY BRIEF FOR THE STATE PETITIONERS

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REPLY BRIEF FOR THE STATE PETITIONERS

Pursuant to Supreme Court Rules 34.4 and 35.3, Petitioners Massachusetts Personnel Administrator and Civil Service Commission file this brief in reply to the brief on the merits filed by the respondents.

I. THESE CASES ARE NOT MOOT BECAUSE THE ORDERS OF THE DISTRICT COURT HAVE PERMANENT EFFECT AND CIRCUMSCRIBE THE STATE PETITIONERS' ADJUDICATION OF PENDING ADMINISTRATIVE APPEALS.

Contrary to the suggestions of respondents[1/] and amici supporting respondents,[2/] these cases are not moot as to the State petitioners. A live case or controversy under Article III of the United States Constitution remains because (1) the orders of the district

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1/ Brief at 65-68.

2/ Brief of Officers for Justice Amici at 4; Brief of NOW Amici at 5-20; Brief of NAACP Legal Defense Fund at 3-18. Amici supporting respondents demonstrate some cacophony on the issue, however. While the three briefs cited above suggest that the case is moot, the brief of amici led by the National Bar Association argues that the case is not moot because Mass. St. 1982, c. 190 only applies to those individuals who lost jobs in 1981, "while the consent decree as modified remains in force for an indeterminate period." Brief at 10 n. 4.

(footnote continued)

court by their terms carry permanent effect; (2) the orders currently circumscribe the pending Massachusetts Civil Service Commission adjudication of terminated police and fire officers' administrative appeals; and (3) even if the district court's orders have expired by their terms, the fact that the underlying judgments in the police and fire cases will remain in force and will not be vacated as moot insures that the State petitioners will be the subjects of future, adverse application of the

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(footnote continued)

The United States argues that the case is not moot because (1) the orders "permanently" enjoin layoffs in any manner that would reduce percentages of minority officers, and (2) the Court's "resolution of the issue" in this case "could . . . be crucial to the disposition" of laid-off officers' administrative appeals. Brief at 9 n. 8.

specific judgment before this Court on appeal.

A brief discussion of the basis for respondents' suggestion of mootness precedes successive consideration of each of these points.

A. The Provisions of Mass. St. 1982, ch. 190.

The factual basis for respondents' suggestion of mootness is narrow. Respondents exclusively rely on the combination of state legislation passed June 8, 1982, and the rehiring of Boston police and firefighters which followed. The legislation, 1982 Mass. Adv. Legis. Serv. ch. 190, §25 (Law. Co-op.)[3/] became effective and the officers were re-

3/ The text of Mass. St. 1982, ch. 190, §25 appears at pp. 1a-2a of the appendix to this reply brief.

hired subsequent to entry of the orders of the district court and the judgment of the United States Court of Appeals for the First Circuit affirming those orders, but before this Court granted certiorari on November 1, 1982.

Massachusetts St. 1982, ch. 190 significantly improved Boston's financial condition by enabling the City to institute new methods of revenue collection. In addition, the Act compelled the reinstatement of all police and fire officers terminated for lack of funds after July 1, 1981, and prohibited termination of those same officers for lack of funds in the future. Mass. St. 1982, ch. 190, §25. The Act also required that through June 30, 1983 the City of Boston maintain minimum staffing levels in its police and fire departments. Respondents

and amici argue that the rehiring of police and fire officers under the terms of the state legislation moot the cases currently before the Court.

B. The Cases are Not Moot Because The District Court's Orders By Their Terms Carry Permanent Effect.

The Court's jurisdiction under Art. III, §2 of the Constitution extends only to actual cases and controversies. Sosna v. Iowa, 419 U.S. 393, 402 (1975). A case or controversy becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Murphy v. Hunt, 455 U.S. 478, 481 (1982) (per curiam), quoting United States Parole Commission, v. Geraghty, 445 U.S. 388, 396 (1980) and Powell v. McCormack, 395

U.S. 486, 496 (1969). "[J]urisdiction, properly acquired, may abate if the case becomes moot because

> (1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and
>
> (2) . . . events have completely and irrevocably eradicated the effects of the alleged violation . . .

County of Los Angeles, v. Davis, 440 U.S. 625, 631 (1979). The burden of demonstrating mootness "is a heavy one." Id. citing United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953). Respondents fail to meet that burden because they have not demonstrated that "events have completely and irrevocably eradicated the effects" of the district court's orders on the State petitioners'

future compliance with the consent decrees and state law. County of Los Angeles, 440 U.S. at 631. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122-125 (1974). Against the weight of express language in the district court orders and opinion, the respondents and amici contend that the orders have expired by their terms and their expiration moots the cases before this Court. Brief at 68. Brief of NOW Amici at 17 n. 6. The terms of the district court's orders and its opinion belie these contentions.

The orders expressly enjoin the "Commissioner of Police of the City of Boston . . . from reducing, pursuant to any departmental or city program of reductions in force . . . the percentage of black and Spanish surnamed . . .

police officers." Castro v. Beecher, 522 F. Supp. 873, 878 (D. Mass. 1981) (P.A. 65-66) (emphasis added). The orders also mandate the establishment and use of separate seniority lists "in implementing any program of reductions in force on account of lack of funds or abolition of positions." 522 F.Supp. at 877-88 (P.A. 65-66) (emphasis added).

The orders expressly impose permanent prohibitions and affirmative duties on the State petitioners as well. The orders restrain the Massachusetts Civil Service Commission, in its adjudication of police and fire officer termination appeals, "from disapproving, invalidating, or interfering with . . . termination[s]" on the basis of the order of layoff prescribed by the district court.

522 F. Supp. at 878. (P.A. 68) In addition, the orders prospectively require the Massachusetts Personnel Administrator to create reinstatement lists "[f]or the purpose of continuing the implementation of [the district] court's prior orders" and to supervise reinstatement "so that the percentage of black and Spanish-surnamed officers does not fall below 11.7 percent." 522 F. Supp. at 878. (P.A. 68-69)

Thus the terms of the district court's orders have not been "fully and irrevocably carried out." Contrast University of Texas v. Camenisch, 451 U.S. 390, 398 (1981). The orders apply to "any" program of reduction in force; they circumscribe the adjudication of

state administrative appeals; and they prospectively require state and local officials to supervise the hiring and termination of public safety personnel so as to preserve percentages of minority officers. The plain language of the orders sustains their effect and preserves the controversy before this Court.

The opinion of the district court further supports the view that its orders carry permanent effect. The district court concluded, based on its interpretation of the court of appeals' 1973 and 1974 decisions in these cases, that any layoff program which "resulted" in a reduction of minority percentages would warrant prospective modification of the consent decrees and suspension of state

law. 522 F. Supp. at 877. (P.A. 86-87)[4/] The district court opinion also states:

> [I]f anything similar to Proposition 2 1/2 had been in effect at the time that the remedial decrees were originally entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.

522 F. Supp. at 877. (P.A. 87-88) This implicit "allowance" for the "maintenance" of minority percentages, which the district court divined from between the lines of previous decrees, works a permanent, not temporary modification of

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4/ Indeed, amici led by the National Bar Association refer to petitioners' appeal as an "assault on the modified consent decree," Brief at 15 (emphasis added), thus implying permanent, prospective effect.

those decrees. According to the district court, "hypothetically ongoing terminations" at the time of entry of the decrees would have prompted the parties to "fashion" the decrees so as to preserve minority percentages. Id. The court leaves no doubt that, despite the absence of language applicable to layoffs, its interpretation of the intentions of the parties would justify modification of the decrees and suspension of state law to address any future "hypothetical terminations" that threatened to reduce minority percentages.

Respondents suggestion that the "situation called for" no permanent order and that they "sought none," Brief at 68, confuses the factual predicate for the orders with their legal effect.

The mootness question turns on the latter. As legal grounds for their motion to modify prior orders respondents invoked the authority of the district court to "modify ongoing relief." See Brief at 17. The district court based its "modification" on what it determined to be the "nature" and "objective" of the remedial decrees. 522 F. Supp. at 877 (P.A. 87-88) The ongoing supervision of the consent decrees by the district court, so crucial to respondents' request for modification of prior remedial orders in these cases, likewise determined the scope of the modification secured. Respondents concede that the modification orders "were a part" of the "ongoing remedial programs." Brief at 68. The

admission concedes the point. The language of the orders and the opinion speak in permanent, prospective terms consistent with the respondents' conception of the district court's supervisory powers. The orders' permanent effects thus sustain the cases before this Court. Super Tire Engineering Co. v. McCorkle, 416 U.S. at 122-125.

C. The Orders Currently Circumscribe The Pending Adjudication Of Police And Fire Officers' Administrative Appeals.

The August 7, 1981 orders of the district court restrain the Massachusetts Civil Service Commission (the Commission), in its adjudication of administrative appeals taken by terminated police and fire officers, "from disap-

proving, invalidating, or interfering with . . . termination[s]" on the basis of the order of layoff prescribed by the district court. 522 F. Supp. at 878. The appeals of officers terminated in the summer of 1981, which include claims for back pay, are currently pending before the Commission. Pursuant to Massachusetts General Laws Ann. ch. 31, §43 (West)[5/] the Commission "shall affirm the action of the appointing authority if it finds that [the termination] was justified." The laid-off officers claim, inter alia, that their terminations were not justified because

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5/ As appearing in Mass. St. 1978, ch. 393, §11. Section 43 was rewritten by Mass. St. 1981, ch. 767, §20. The amended version does not govern the terminated officers' appeals. See Mass. St. 1981, ch. 767, §29(4).

of violation of their "seniority rights." Petition of Boston Firefighters Union at 17. By their terms the district court's orders preclude administrative consideration of this issue or application of Mass. Gen. Laws Ann. ch. 31, §39, to the appeals.

Respondents argue, nonetheless, that the issue before the Commission is not identical to that before the Court and therefore any decision by the Court "will not dispose" of the administrative claims nor relieve "unremedied" injury. Brief at 66. In their zeal to distinguish the issues before the two tribunals, and thereby demonstrate the mootness of the Supreme Court appeal, respondents overlook the "unremedied" injury to State officials: the circumscription of the

Commission's jurisdiction by the terms of the district court orders. The orders restrain the Commission from "disapproving" or "invalidating" the terminations on the basis of the order of layoff. By precluding consideration of the seniority question, the orders prospectively suspend application of §39 and impermissibly and permanently foreclose a legitimate area of Commission inquiry.

Respondents' focus on the "dispositive effect" of a Supreme Court ruling on the merits of the administrative appeals is misdirected. State petitioners do not argue that the "dispositive effect" of a Supreme Court decision on the pending administrative appeals sustains the controversy before the Court. Rather, they argue that the

orders currently restrict full adjudication of the appeals according to state law, that those restrictions sustain a live controversy before this Court, and that reversal of the orders is required to free the State petitioners from the orders' effects.[6/]

D. The Expiration of the District Court's Orders Would Not Moot This Case.

Even if the district court's August 7, 1981, orders have expired by their

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6/ For the reasons set forth in Section I, D, infra, an order simply vacating the district court orders as moot, see, e.g., United States v. Munsingwear, 340 U.S. 36, 39 (1950), will not relieve the State petitioners from all of their "unremedied" injuries. Brief of Respondents at 66.

terms, and do not circumscribe pending adjudications by the Massachusetts Civil Service Commission, those circumstances would not moot the cases before this Court. Since the State petitioners' obligations under the consent decrees entered in these cases continue unabated and the challenged orders will adversely affect compliance, the Court retains jurisdiction over the present dispute and reversal of the lower court orders is required.

The Court has previously held that where a lower court decision "continues to play a substantial role in the response of [government] officials," the Court's jurisdiction does not cease. Carroll v. Princess Anne, 393 U.S. 175, 178 (1969) (Carroll). Despite the

expiration of lower court orders in Carroll the Court found that the "underlying question" of the case "persist[ed]" and was "agitated" by a "continuing program" of the petitioners. Id. citing Bus Employees v. Missouri, 374 U.S. 74, 78 (1963)(underlying labor dispute remained unresolved).

The Ninth Circuit relied on Carroll to support a similar conclusion in Brown v. Board of Bar Examiners of Nevada, 623 F.2d 605, 608-609 (9th Cir. 1980). Brown held that the State's appeal was not moot because the "underlying dispute" in the case concerning the district court's jurisdiction survived, despite the fact that the plaintiff "obtained [her] particular equitable relief[.]" The State's appeal presented a live case or controversy because it concerned

> an ongoing issue of federal court jurisdiction and of federal-state relationships, the consideration of which should not be defeated by a short term order which state officials are constrained to obey rather than be held in contempt.

Id. at 609.7/

Both Carroll and Brown address circumstances similar to those presented by this case: the expiration of lower court orders challenged on appeal by those who have complied. The cases enunciate a rule which squarely applies to this controversy: where a party

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7/ See also Modern Plastics Corporation v. McCulloch, 400 F.2d 14, 16-17 (6th Cir. 1968)(NLRB's appeal from district court injunction not mooted by passage of date for election at issue where further efforts of NLRB "would be frustrated by the issuance of another injunction.")

seeking to overturn judicial orders may suffer present or future adverse effects from the entry of the orders, its appeal from them is not moot. "It may be said that the adverse effects give the challenger, who otherwise has nothing to gain, a sufficient interest in the litigation." Note, "Mootness on Appeal," 83 Harv. L. Rev. 1672, 1680 (1970).[8/]

The orders of the district court and the judgment of the court of appeals in these cases will continue to affect the State petitioners' compliance with the consent decrees and Massachusetts civil service law. The nature of these cases compels this conclusion. Respondents

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8/ Cf. Sibron v. New York, 392 U.S. 40, 57 (1968)(appeal from criminal conviction is moot only where there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction).

brought these cases as class actions. Castro v. Beecher, 334 F. Supp. 930, 934 (D. Mass. 1971). Boston Chapter, NAACP v. Beecher, 371 F. Supp. 507, 510 (D. Mass. 1974). The consent decrees entered in the police and fire cases have prospective, state-wide application. See Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 967-970 (1st Cir. 1982), and earlier decisions cited therein. The police and fire "cases" therefore possess independent, Article III identities distinct from those created by the August 7, 1981 orders. The lower court orders, even if vacated as moot,[9/] would un-

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9/ See United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("established" practice of Court in moot case "to reverse or vacate the judgment below and remand with a direction to dismiss").

doubtedly serve as the legal basis for entry of subsequent orders in these cases enjoining application of Mass. Gen. Laws ch. 31, §39 to future layoffs in the cities and towns of Massachusetts covered by the decrees.[10/] The State petitioners are not and will not be free to apply §39 to future layoffs with impunity; for this reason they will continue to suffer an adverse effect from the lower court decisions.

10/ Accordingly, unlike the petitioner in De Funis v. Odegaard, 416 U.S. 312, 319 (1974), or the appellee in Brown, respondents and their class retain a "live" interest in the resolution of the controversy before the Court because as a class, they will continue to seek and to hold public safety positions throughout Massachusetts. Cf. Sosna v. Iowa, 419 U.S. 393, 399-402 (1975)(vitality of case sustained by existence and separate "legal status" of certified class).

Vacating the lower court orders as moot will not relieve petitioners' injury. The practice approved in Munsingwear "eliminates" judgments. Id. at 40. "[I]t is commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." Id. at 41. The parties in the cases before the Court, however, stand on different footing than the parties in Munsingwear. The State petitioners remain parties to ongoing proceedings before the district court. The consent decrees binding state officials will not be vacated as moot. Under these circumstances, the adverse effects of the lower court orders transcend their stare decisis or res judicata effects. While those effects may be

vitiated by vacating the orders as moot, the principle established by the lower court decisions at issue will not be vacated and may serve as the basis for further, adverse action against the State petitioners in the ongoing cases.

> Although a decision vacating a judgment [as moot] necessarily prevents the opinion of the lower court from being the law of the case . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the . . . [c]ircuit.

County of Los Angeles v. Davis, 440 U.S. 625, 646 n. 10 (Powell, J., dissenting). As long as a complaining party on appeal demonstrates the fact or possibility of adverse effects flowing from the lower court decision, its appeal is not moot.

Where Massachusetts officials remain bound by judgments in both the "police" and "fire" cases which impose prospective, statewide duties, their "cases" remain "live" and their challenge to the district court's orders is not moot.[11/] As long as the underlying police and fire case judgments remain in force, the State petitioners' injury cannot be

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11/ This conclusion - that the cases live - is "particularly appropriate in the context of an injunction, where proper procedure is to seek judicial review rather than to risk contempt." Brown, 623 F.2d at 609. See Carroll, 393 U.S. at 179-180. The conclusion is compelled where the injunctive effect of the district court's orders precludes compliance with a presumptively valid state law. Brown, 623 F.2d at 609. The Massachusetts officials who complied under protest with federal orders should not be penalized for following the appropriate avenues of relief from those orders.

remedied by vacating the lower courts' orders as moot. Their interest in reversing those orders and removing the restraints on their future administration of the state civil service law generally and the consent decrees particularly creates a sufficiently live controversy for adjudication by this Court.

II. THE COURT'S RECENT DECISION IN EEOC v. WYOMING DOES NOT UNDERMINE ARGUMENTS PREVIOUSLY MADE BY THE STATE PETITIONERS.

E.E.O.C. v. Wyoming, ___ U.S. ____, 51 LW 4219 (March 2, 1983) does not undermine the State petitioners' invocation of principles of federalism embodied in the Tenth Amendment for several reasons. First, the State petitioners rely on principles of federalism applied by the Court to the exercise of the federal

equity power generally, see Hills v. Gautreaux, 425 U.S. 284, 293 (1976), not solely on a literal application of the terms of the Tenth Amendment. E.E.O.C. v. Wyoming does not relieve a federal court from its duty to temper equitable relief with concerns for the proper balance between state and federal power. Second, under the terms of the tripartite test established by Hodel v. Virginia Surface Mining, 452 U.S. 264, 287-288 (1981) and applied in E.E.O.C. v. Wyoming, the "degree" of intrusion into the State's ability to structure its integral operations in these cases surpasses the impairment found in E.E.O.C. and equals that found in National League of Cities v. Usery, 426 U.S. 833 (1976).

Finally, the E.E.O.C. dissenters observed that "Congress may act [under the Fourteenth Amendment] only where a violation lurks." E.E.O.C. v. Wyoming, 51 LW at 4228. This concern echoes the State petitioners' protest in these cases that the federal court orders violate principles of federalism because they extend far beyond the scope of any constitutional violation to suspension of a valid state law.

CONCLUSION

For all of the above reasons and for the reasons set forth in the State petitioners' initial brief, the Court should proceed to the merits of these cases and reverse the judgment of the First Circuit and the orders of the district court.

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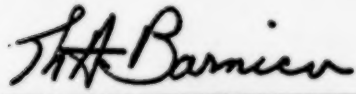

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APPENDIX A

Massachusetts Acts of 1982

Chapter 190

AN ACT Establishing the City of Boston Funding Loan Act of Nineteen Hundred and Eighty-Two And The Massachusetts Convention Center Authority.

SECTION 25. Notwithstanding the provisions of any general or special law to the contrary, the appointing authority of the police department and the fire department of the City of Boston shall reinstate to active service as of the effective date of this act any uniformed officer of either department who was in service or on injured leave as of July first, nineteen hundred and eighty-one, or was temporarily suspended as of July first, nineteen hundred and eighty-one, which suspension has expired, except for disciplinary reasons consistent with chapter thirty-one of the General Laws or in pursuit of an involuntary retirement under section seven of chapter thirty-two of the General Laws and shall not thereafter terminate any such officer or take any other personnel action the effect of which would be to separate such officer from active service in the future for lack of funds. During the fiscal years ending June thirtieth, nineteen hundred and eighty-two and June thirtieth,

nineteen hundred and eighty-three the City of Boston shall maintain in the police department and the fire department of the City of Boston, either in active service, training or recruitment, no fewer uniformed employees than the total of the number in service or on injured leave on March twenty-fourth, nineteen hundred and eighty-two plus the number of uniformed employees eligible for reinstatement pursuant to this section, without regard to the number of eligible uniformed employees who actually return to service in either department. Nothing herein shall prevent an employee of either department from being placed in injured leave under the provisions of section one hundred and eleven F of chapter forty-one of the General Laws. The mayor shall annually request and the city council shall annually appropriate sufficient amounts to the respective departments to cover the costs imposed by this section, but nothing in this section shall be construed to permit the officers in charge of said departments to expend funds in excess of available appropriations in violation of the city charter.